Petition and Transcript of Record

Supreme Court of the United States

OCTOBER TERM, 1927

No. 337

THE WILLIAMSPORT WIRE ROPE COMPANY,
PETITIONER,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED JUNE 29, 1927

CERTIORARI GRANTED NOVEMBER 28, 1927

(32,789)

(32,789)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

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[fol. 1]

IN SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1927

No.

THE WILLIAMSPORT WIRE ROPE COMPANY, a Corporation,
Petitioner,

v.

THE UNITED STATES, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

Petition

The petitioner, The Williamsport Wire Rope Company, a corporation, by its Counsel, prays that a writ of certiorari issue in this case to review the judgment of the Court of Claims in favor of the United States, entered in the above entitled case on May 2, 1927.

Statement

The question presented here is whether the Court of Claims, and, consequently, the District Courts of the United States, have jurisdiction to hear and determine cases arising under Sections 327 and 328 of the Revenue Act of 1918, [fol. 2] which require the Commissioner, where he is unable to determine a taxpayer's statutory invested capital and or where abnormal conditions affecting capital or income are found to exist which make the ordinary formula for computing war profits and excess profits taxes work exceptional hardship and produce inequitable results to the taxpayer, to compute these taxes at the average rate of taxes of representative corporations engaged in a like or similar trade or business.

The provisions of Sections 327 and 328 are set forth in the supporting brief.

The question arises in this case in this way:

Petitioner, in due season, filed its return of income and profits taxes for the calendar year 1918, and computed its

tax under Section 301 of the Revenue Act of 1918 to be $306,381.77. Such portion thereof as represented war profits tax was in excess of 50 per cent of its indicated taxable income. In such cases the Revenue Act of 1918, Section 328 (b) provides that the taxpayer may pay 50 per cent as war profits tax and make application for the computation of its taxes under Sections 327 and 328. Petitioner, however, paid the entire amount of the tax found to be due under Section 301.

In 1920 a Revenue Agent made an examination of petitioner's books and made a number of proposed adjustments or corrections, the principal one being an adjustment of petitioner's inventories of raw material, work in process and finished merchandise back to 1914. For the year 1918 (fol. 31 petitioner's inventory was increased at the beginning of the year by $229,220.52, and at the end of the year by $317,178.54. Upon this adjustment or alleged correction in inventory, which was approved by the Commissioner, an additional tax of $89,084.81 was assessed against and collected from petitioner.

Petitioner, on June 14, 1924, filed a claim for a refund of $180,000.00, stating therein that this amount represented the amount by which its tax computed under Section 301 of the Revenue Act of 1918 exceeded its tax as computed under Sections 327 and 328 of that Act, and insisted that its tax should be computed under these Sections. The Commissioner took no action upon this claim, and after six months elapsed petitioner filed suit for the recovery of these taxes.

The petitioner alleged the assessment and collection from it of income and profits taxes computed under Section 301 of the Revenue Act of 1918 is illegal, and that as a matter of fact as well as law it has a legal right to have its taxes for the year 1918 computed under Sections 327 and 328 of the Revenue Act of 1918, because (1) it is impossible for the Commissioner of Internal Revenue or anyone else to determine the correct amount of petitioner's invested capital as defined in Section 326 of the Revenue Act of 1918, and (2) abnormal conditions exist affecting both the capital and income of the petitioner which work upon it an exceptional hardship, evidenced by gross disproportion between the tax paid by it, under Section 301 of the Revenue

Act of 1918, and its tax computed under Sections 327 and 328 of the Revenue Act of 1918, by reference to representa-
(fol. 4) tive corporations engaged in the same trade or business.

In support of the allegations that it is impossible to correctly determine its invested capital the petitioner cited these facts:

1. Petitioner pursued a policy of charging large sums expended for plant additions and improvements to expense and not to capital.

2. Prior to the year 1918 petitioner developed valuable secret processes essential to the profitable operation of its business, and no part of the cost thereof has ever been capitalized.

These facts were ignored by the Commissioner of Internal Revenue when he made his adjustment of petitioner's invested capital.

In support of its allegations that abnormal conditions exist affecting its capital and income which work upon it an exceptional hardship, petitioner cited these facts:

1. Since its organization, in May, 1887, it has never undergone a reorganization or merger, but has since that time conducted an increasing and important business, and has thereby acquired a good will asset not recorded on its books, the value thereof, namely, $1,037,743.00, being ignored by the Commissioner of Internal Revenue in his computation of its invested capital.

2. During the year 1918 petitioner used in its business large sums of borrowed money. On January 1, 1918 its percentage of borrowed money to capital stock ($100,000.00)
(fol. 5) was 114.8 per cent, and on December 31, 1918, was 122.3 per cent.

3. The salaries paid its officers were abnormally low, being but 3.76 per cent of its taxable income for 1918.

4. The tax imposed upon petitioner for 1918 is 67.87 per cent of its taxable income, whereas as to representative corporations engaged in the same trade or business the tax imposed is not in excess of 55 per cent of their taxable income.

3. This is a test case. There are now pending in the Court of Claims and in the District Courts of the United States a very large number of cases involving the same question as is here presented. Petitioner's counsel have other identically similar cases and know of a number of others which will be controlled either in whole or in part by the decision in this case. Since the decision in this case [fol. 7] was rendered petitioner's counsel have received constant inquiries from other taxpayers whose claims are directly affected.

4. The decision of the Court of Claims is directly contrary to the decisions of the United States Board of Tax Appeals, the Supreme Court of the District of Columbia and the Court of Appeals of the District of Columbia, and is contrary to principles established by the Court of Claims in following those decisions.

5. The decision of the Court of Claims is contrary to principles of other decisions of that Court.

6. This case was brought as a test case at a time when there existed a right of appeal from the Court of Claims to this Court. Had the Board known it possessed that right it would have insisted, as it has in the test cases which probably have been brought in the District Court so as to preserve the right to appeal, upon appearing for review.

7. The decision of the Court of Claims is contrary to the law and decisions and will lead to the assessment and collection of taxes not authorized by Sections 234 and 328 of the Revenue Act of 1918.

8. The decision of the Court of Claims is predicated upon facts contrary to those alleged in the amended petition and which, if the determination were to stand, are untrue.

Wherefore, it is respectfully submitted that this petition for writ of certiorari to review the judgment of the Court of Claims should be granted.

James Walter, 1420 Park Building, Pittsburgh, Pa.
Clarence A. Miller, 1420 F Street, N. W., Washington, D. C., Counsel for Petitioner.

[fol. 1] In the Court of Claims of the United States

No. [illegible]

The Williamsport Wire Rope Company

vs.

The United States

I. History of Proceedings

On December 19, 1924, the plaintiff filed its original petition.

On January 27, 1925, a general traverse was entered under Rule 24.

Subsequently, to wit, on January 17, 1927, by leave of court, the plaintiff filed an amended petition. Said amended petition is as follows:

II. Amended Petition. Filed January 17, 1927

To the Honorable the Chief Justice and the Judges of the Court of Claims of the United States:

The claimant, The Williamsport Wire Rope Company, a Pennsylvania corporation, (hereinafter referred to as your petitioner), represents and alleges as follows:

[fol. 2] I

The Williamsport Wire Rope Company is a corporation under the laws of the State of Pennsylvania, incorporated on the 20 day of May, 1899, as The Morrison Wire Rope Company, changing its name on, to wit, the 7th day of May, 1900, to The Williamsport Wire Rope Company, and has its office and principal place of business in the City of Williamsport, County of Lycoming, State of Pennsylvania, and has since the date of its incorporation been engaged in the manufacturing of wire or steel, or both, and parts thereof, wire rope, flattened strand, wire brass, copper or any other metal. It is now and at all times hereinafter mentioned has been engaged principally in the business of manufacturing wire rope and selling its products throughout the United States and elsewhere.

II

In conformity with the Revenue Act of 1918 (40 Stat. 1057), your petitioner, during the year 1919, on, to wit, the 15th day of June, 1919, and within the time prescribed by law, made and filed with the Collector of Internal Revenue of the United States for the Twelfth District of Pennsylvania, at Scranton, Pennsylvania, in which district the city of Williamsport is located, a return of all income received by it during the calendar year 1918. The said return of income was made on Form 1120 of the Office of the Commissioner of Internal Revenue, and was in all respects complete and regular, and in accordance with the laws and regulations relating thereto, and showed thereon a total tax liability of $306,381.77.

III

The said return was not false or fraudulent.

IV

The tax shown to be due on said return was, upon notice and demand from the said Collector of Internal Revenue claiming to act in pursuance of the Revenue Act of 1918, paid to him as follows:

March 12, 1919	$68,750 00
June 14, 1919	84,440 89
September 15, 1919	76,595 44
December 15, 1919	76,595 44
	$306,381 77

V

As a result of an examination of its books by Internal Revenue Agents A. R. Viner, C. L. Bush, and W. H. Gross, your petitioner on, to wit, the 13th day of April, 1920, was informed and advised by the Commissioner of Internal Revenue that, because of an amendment or revised computation of its income, its tax liability for the year 1918 was $89,994.86 in addition to the tax of $306,381.77 already paid, whereupon your petitioner duly filed with the Com-

missioner of Internal Revenue in protest of his action in proposing to assess said additional tax of $89,084.85.

VI

Notwithstanding the protest of your petitioner, the Com- [fol. 4] missioner of Internal Revenue did illegally on, to wit, the 30th day of June, 1920, make and levy against your petitioner an additional assessment of taxes based upon said amended or revised computation of income in the sum of $89,084.85, and through the Collector of Internal Revenue for the Twelfth District of Pennsylvania, made demand upon your petitioner for the payment of said taxes so assessed, with threats to impose penalties, levy distraint, and seize your petitioner's property if said tax be not paid.

VII

Your petitioner on, to wit, the 12th day of July, 1920, paid to the said Collector of Internal Revenue for the Twelfth District of Pennsylvania the said amount of $89,084.85, additional taxes assessed against it.

VIII

On, to wit, the 30th day of April, 1924, the Commissioner of Internal Revenue, informed and advised your petitioner that its tax liability for the year 1918 had again been recomputed and found to be $38,987.53, resulting in an overpayment of its taxes by your petitioner in the sum of $12,397.09, which said sum was refunded to your petitioner on, to wit, the 19th day of June, 1924.

IX

The computation of the taxes of your petitioner was made by Commissioner of Internal Revenue under and by virtue [fol. 5] of the provisions of Section 301 of the Revenue Act of 1918, a true copy of said computation being attached hereto as "Exhibit A," made a part of this petition, and prayed to be read and taken as a part hereof.

X

Your petitioner did not derive or receive any income from Government contracts on a cost plus basis during the year 1918.

XI

The Commissioner of Internal Revenue, as shown by "Exhibit A," illegally computed the Excess Profits Tax and War Profits Tax of your petitioner for the year 1918, under the provisions of Section 301 of the Revenue Act of 1918, because as a matter of fact, and as a matter of law, the Excess Profits Tax and War Profits Tax of your petitioner for the year 1918 legally, properly and correctly, should and must be determined and computed in accordance with the provisions of Section 327 (a) and (d) and Section 328 of the Revenue Act of 1918, for the following reasons: (1) It is impossible for the Commissioner of Internal Revenue, your petitioner, or anyone to determine what is the correct invested capital of your petitioner for the year 1918 as that term is defined in Section 326 of the Revenue Act of 1918; and (2) There are abnormal conditions affecting the capital and income of your petitioner which work upon it an exceptional hardship evidenced by gross disproportion between the tax paid by it and its tax when [fol. 6] computed by reference to representative corporations engaged in the same trade or business.

XII

Your petitioner made application to the Commissioner of Internal Revenue to have its tax liability computed, and its taxes assessed under and by virtue of the provisions of Sections 327 and 328 of the Revenue Act of 1918, but the Commissioner of Internal Revenue fails, refuses, and or neglects so to do, but continues illegally, erroneously and without warrant of law, to compute and assess said taxes under and by virtue of the provisions of Section 301 of the Revenue Act of 1918.

XIII

By way of a particular wherein and whereby it is impossible to determine what is the invested capital of your

petitioner, as defined by Section 326 of the Revenue Act of 1918, it has been the policy of your petitioner for a long period of years prior to the year 1918, with respect to plant additions and improvements, to charge large sums to expense instead of to its capital account.

XIV

By way of another particular illustrating the impossibility of determining the invested capital of your petitioner, there has been developed by your petitioner and used in the manufacture of its products a number of valuable secret processes, essential to the profitable operation of its business. No part of the cost of development of these secret processes has ever been capitalized, and the Commissioner of Internal Revenue has neglected, refused, and failed to make any adjustment of invested capital with respect to these items, the majority of which were developed several years prior to 1918, and detailed records showing the amount of labor and expense incurred in the said development are not now available.

XV

By way of another particular illustrating the impossibility of determining the invested capital of your petitioner, and the abnormal conditions affecting the capital and income of your petitioner, it respectfully shows that it has not undergone any sale, reorganization, or merger since the date of its organization on the 2nd day of May, 1887; that it is engaged in a stable business, and, has during the thirty-one years of its successful and consistently increasing business acquired a very large asset represented by its good will, which asset is not recorded on its books in any amount whatsoever, and the value of its good will has not been included in its invested capital in the computation made by the Commissioner of Internal Revenue, as shown by "Exhibit A." The value of the good will of your petitioner, computed in accordance with the provisions of the formula of the Commissioner of Internal Revenue as set out in A. R. M. 34 (2 C. B. 31), is $1,057,713.00, which amount has not been included in the invested capital of your petitioner by the Commissioner of Internal Revenue.

[fol. 8] XVI

By way of another particular illustrating the impossibility of determining the invested capital of your petitioner, and the abnormal conditions affecting the invested capital of your petitioner, it respectfully shows that, due to the ultra conservative policy of the management, large sums expended for plant, machinery, equipment, and other tangible assets have been charged to expense accounts rather than to its capital account, thus rendering your petitioner's true statutory invested capital materially greater than the amount appearing on its books.

XVII

By way of another particular illustrating the abnormal conditions affecting the income of your petitioner, it respectfully shows that, during the year 1918, the amount of borrowed money used by it in its business was abnormally large. On January 1, 1918, your petitioner was using in its business $114,834.91 of borrowed money, and on December 31, 1918, was using in its business borrowed money in the amount of $122,253.82, although its capital stock was only $100,000.00. At the beginning of the year 1918 its percentage of borrowed money to capital stock was 114.8, while at the end of the year 1918 its percentage of borrowed money to capital stock was 122.3.

XVIII

By way of another particular illustrating the abnormal conditions affecting the income of your petitioner during the [fol. 9] year 1919, the following sums as salary:

Garrett Cochran, President	$5,999.84
Jos. W. Cochran, Treasurer	4,000.00
C. La Rue Munson, Vice Pres.	2,000.00
Edgar Munson, Secretary	2,000.00
Robert Gilmore, Gen'l Manager	7,145.00

The total salaries paid to the officers of your petitioner for the year 1918 was $21,144.84, or 3.76 per cent of the taxable income of your petitioner for that year. These officers were actively engaged in and devoted all of their time to the

business of your petitioner, and the salaries paid to them were wholly inadequate for the services performed, and abnormally low when compared with the salaries paid officers of other corporations engaged in the same trade or business.

XIX

By way of a particular illustrating the exceptional hardship imposed upon your petitioner as evidenced by the gross disproportion between the tax paid by it and its tax when computed by reference to representative corporations engaged in the same trade or business, your petitioner shows that its Excess Profits Tax and War Profits Tax, as computed by the Commissioner of Internal Revenue under Section 301 of the Revenue Acts of 1918, is 63.87 per cent of its taxable income, whereas the average rate of Excess Profits Tax and War Profits Tax paid by representative corporations engaged in the same trade or business is not in excess of 55 per cent of their taxable income.

[fol. 10] XX

On, to wit, the 14th day of June, 1924, your petitioner duly filed with the Commissioner of Internal Revenue, of the Treasury Department, through the said Collector of Internal Revenue for the Twelfth District of Pennsylvania, to whom the said tax was paid, its claim for the refund of $[illegible], representing the amount by which its tax as computed by the Commissioner of Internal Revenue under Section 301 exceeds its tax when computed under and in accordance with the provisions of Section 327 and 328 of the Revenue Act of 1918, and your petitioner is informed and believes, and so believing avers, that the said Collector of Internal Revenue forwarded the said claim for refund to the said Commissioner of Internal Revenue of the Treasury Department.

XXI

The claim for refund filed by your petitioner was made on Form 843 of the Office of the Commissioner of Internal Revenue of the Treasury Department as required and was in all respects complete and regular, and in accordance with the laws and regulations relating thereto. The reasons set

forth by your petitioner in its said claim for refund were, among others, that your petitioner is entitled to have its taxes for the year 1918 determined in the manner prescribed in Sections 327 and 328 of the Revenue Act of 1918.

XXII

Although more than six months have elapsed since the [fol. 11] date of filing of the said claim for refund, no part of the amount properly refundable has been refunded to your petitioner.

XXIII

By way of a separate item, your petitioner respectfully shows that during the taxable year 1918 there was paid to it the sum of $25,209.09, representing the proceeds of a life insurance policy on the life of Garrett Cochran, its President, who died July 8, 1918. The said policy was issued by the Union Central Life Insurance Company of Cincinnati, Ohio, bearing number 506,267, being dated the 11th day of February, 1916, and your petitioner being named therein as the beneficiary, the premiums on said policy having been paid by your petitioner from its corporate funds.

XXIV

The Commissioner of Internal Revenue illegally included in his amended or revised computation of the income of your petitioner for the taxable year 1918 the proceeds of said life insurance policy to the extent of $24,682.44.

XXV

Your petitioner duly protested the inclusion in its taxable income of the said sum of $24,682.44, the proceeds of said life insurance policy, on the life of its deceased President, but the Commissioner of Internal Revenue refused and declined to exclude from the taxable net income of [fol. 12] your petitioner the proceeds of said life insurance policy, or any part thereof, and illegally and unlawfully levied upon and collected from your petitioner an alleged income and profits tax of $20,272.41 as a result of the inclusion of the proceeds of said life insurance policy in its taxable income.

XXVI

On, to wit, the 14th day of June, 1924, your petitioner duly filed with the Collector of Internal Revenue for the Twelfth District of Pennsylvania its claim for the refund of the said $20,272.41, illegally and unlawfully levied, assessed, and collected from it.

XXVII

The said claim for refund was made on Form 843 of the office of the Commissioner of Internal Revenue of the Treasury Department as required, and was in all respects complete and regular, and in accordance with the laws and regulations relating thereto. The reasons set forth by your petitioner in its said claim for refund were that the amount of said tax was an assessment upon income which included the proceeds of life insurance policies, not legally required to be included in its taxable net income under the decision of the Supreme Court of the United States in the Supplee-Biddle Hardware Company case.

XXVIII

Although more than six months have elapsed since the date of the filing of said claim for refund, no part of the amount properly refundable has been refunded to your petitioner.

[fol. 13] XXIX

Under Sections 1116 and 1117 of the Revenue Act of 1926, your petitioner may be allowed interest at the rate of 6 per cent per annum on the said sums of $[illegible] and $20,272.41, respectively, from the date of payment thereof.

XXX

Attached hereto, and made a part of this petition, is "Exhibit B," containing those sections of the Revenue Act of 1918 hereinbefore referred to in this petition.

XXXI

No action upon your petitioner's foregoing claims has been had before Congress or either House thereof, or any of the Departments of the Government, other than the Treasury Department, or in any other court; your petitioner is the sole owner thereof and the only party interested therein, and no assignment or transfer of the said claims, or any part thereof, or any interest therein, has been made; your petitioner has at all times borne true faith and allegiance to the Government of the United States, and has not in any way aided, abetted, or given encouragement or comfort to any person, persons, or Government in rebellion against the Government of the United States, or at any time aided or abetted, or in any way given comfort to any Sovereign or Government that is, or ever has been, at war with the United States.

Wherefore, your petitioner prays:

[fol. 14] I

That this Court will render a judgment against the United States for the payment by the United States to your petitioner of the said sums of $100,000.00 and $29,272.41, respectively, together with interest thereon at the rate of 6 per cent per annum from the date of payment thereof, to wit, $80,084.85 paid on the 12th day of July, 1920, and the balance thereof paid on the 15th day of December, 1919.

II

That your petitioner may have such other and further relief as justice and the exigencies of this case may demand.

The Williamsport Wire Rope Co., by Logan Cunningham, Vice-President. James Walton, 1530 Park Building, Pittsburgh, Pa., Attorney of Record for Petitioner. Montrie Hitt, Clarence A. Miller, 1319 F Street N. W., Washington, D. C., of Counsel.

[fol. 15] *Duly sworn to by Logan Cunningham. Jurat omitted in printing.*

(Col. 16) — Exhibit "A" to Agreement Between

Copy of Commissioner's Computations

Williamsport Water Rate Company, Year Ended 12-31-18

Schedule 6

Computation of Total Tax (1918)

Excess Profits Tax:	Income	Tax
Net income for taxable year	$102,813.36	
Less excess profits credit	5,014.20	
Balance	$477,799.16	
Taxable at 20%	120,021.24	$20,004.42
Taxable at 65%	357,777.91	232,555.64
	$477,799.16	$208,562.06
War Profits Tax:		
Net Income for taxable year	$102,813.36	
Less war profits credit	114,238.51	
Taxable at 80%	$448,573.65	$358,858.92
Less excess profits tax		208,562.06
War profits tax		$150,296.86
Total excess profits and war profits tax		$358,858.92
Income Tax:		
Net income for taxable year	$102,813.36	
Less Interest on obligations of United States not exempt [Col. 17]	891.12	
War profits and excess profits tax	358,858.92	
Exemption	2,000.00	
	360,961.16	
Taxable at 12%	$20,852.20	$2,502.26
Total tax		$361,361.18

Previously assessed:	Income	Tax
Original assm't account No. 40046	$300,381 77	
Additional assessment June 1919—p. 10, L. 6	8,064 85	
		36,476 62
Overassessed		$12,283 09

[fol. 18] EXHIBIT "B" TO AMENDED PETITION

Revenue Act of 1918

SEC. 301. (a) That in lieu of the tax imposed by Title II of the Revenue Act of 1917, but in addition to the other taxes imposed by this Act, there shall be levied, collected, and paid for the taxable year 1918 upon the net income of every corporation a tax equal to the sum of the following:

First Bracket

30 per centum of the amount of the net income in excess of the excess profits credit (determined under section 312) and not in excess of 20 per centum of the invested capital;

Second Bracket

65 per centum of the amount of the net income in excess of 20 per centum of the invested capital.

Third Bracket

The sum, if any, by which 80 per centum of the amount of the net income in excess of the war profits credit (determined under section 311) exceeds the amount of the tax computed under the first and second brackets.

(b) For the taxable year 1919 and each taxable year thereafter there shall be levied, collected, and paid upon the net income of every corporation (except corporations [fol. 19] taxable under subdivision (c) of this section) a tax equal to the sum of the following:

First Bracket

20 per centum of the amount of the net income in excess of the excess-profits credit (determined under section 312) and not in excess of 25 per centum of the invested capital.

Second Bracket

40 per centum of the amount of the net income in excess of 25 per centum of the invested capital.

(c) For the taxable year 1918 and each taxable year thereafter there shall be levied, collected, and paid upon the net income of every corporation which derives in such year a net income of more than $10,000 from any Government contract or contracts made between April 6, 1917, and November 11, 1918, both dates inclusive, a tax equal to the sum of the following:

(1) Such a portion of a tax computed at the rates specified in subdivision (a) as the part of the net income attributable to such Government contract or contracts bears to the entire net income. In computing such tax the excess-profits credit and the war profits credit applicable to the taxable year shall be used.

(2) Such a portion of a tax computed at the rates specified in subdivision (b) as the part of the net income not attributable to such Government contract or contracts bears to the entire net income.

(d) (1) For the purpose of determining the parts of the income attributable to such Government contract or contracts, the proper apportionment and allocation of the deductions with respect to gross income derived from such Government contract or contracts and from other sources, respectively, shall be determined under rules and regulations prescribed by the Commissioner with the approval of the Secretary.

(d) In any case where the full amount of the excess-profit credit is not allowed under the first bracket of subdivision (a) or (b), by reason of the fact that such credit is in excess of 20 per centum of the invested capital, the part not so allowed shall be deducted from the amount in the second bracket.

(c) For the purposes of the act approved March 21, 1918, entitled "An Act to provide for the operation of transportation systems while under Federal control for the just compensation of their owners, and for other purposes," the tax imposed by this title shall be treated as levied by an Act in amendment of Title II of the Revenue Act of 1917.

SEC. 325. (a) That as used in this title—

The term "intangible property" means patents, copyrights, secret processes and formulae, good will, trademarks, trade brands, franchises, and other like property;

[fol. 21] The term "tangible property" means stocks, bonds, notes, and other evidences of indebtedness, bills and accounts receivable, leaseholds, and other property other than intangible property;

The term "borrowed capital" means money or other property borrowed, whether represented by bonds, notes, open accounts, or otherwise;

The term "inadmissible assets" means stocks, bonds, and other obligations (other than obligations of the United States), the dividends or interest from which is not included in computing net income, but where the income derived from such assets consists in part of gain or profit derived from the sale or other disposition thereof, or where all or part of the interest derived from such assets is in effect included in the net income because of the limitation on the deduction of interest under paragraph (2) of subdivision (a) of section 234, a corresponding part of the capital invested in such assets shall not be deemed to be inadmissible assets;

The term "admissible assets" means all assets other than inadmissible assets, valued in accordance with the provisions of subdivision (a) of section 326, section 330, and section 331.

(b) For the purposes of this title, the par value of stock or shares shall, in the case of stock or shares issued at a nominal value or having no par value, be deemed to be the fair market value as of the date or dates of issue of such stock or shares.

[sec. 22] SEC. 326. (a) That as used in this title the term "invested capital" for any year means (except as provided in subdivisions (b) and (c) of this section):

(1) Actual cash bona fide paid in for stock or shares;

(2) Actual cash value of tangible property, other than cash, bona fide paid in for stock or shares, at the time of such payment, but in no case to exceed the par value of the stock or shares specifically issued therefor, unless the actual cash value of such tangible property at the time paid in is shown to the satisfaction of the Commissioner to have been clearly and substantially in excess of such par value, in which case such excess shall be treated as paid in surplus: Provided, That the Commissioner shall keep a record of all cases in which tangible property is included in invested capital at a value in excess of the stock or shares issued therefor, containing the name and address of each taxpayer, the business in which engaged, the amount of invested capital and net income shown by the return, the value of the tangible property at the time paid in, the par value of the stock or shares specifically issued therefor, and the amount included under this paragraph as paid in surplus. The Commissioner shall furnish a copy of such records and other detailed information with respect to such cases when required by resolution of either House of Congress, without regard to the restrictions contained in section 257;

(3) Paid-in or earned surplus and undivided profits, not including surplus and undivided profits earned during the year.

[sec. 22] (b) Intangible property bona fide paid in for stock or shares prior to March 3, 1917, in an amount not exceeding (a) the actual cash value of such property at the time paid in, (b) the par value of the stock or shares issued therefor, or (c) in the aggregate 25 per centum of the par value of the total stock or shares of the corporation outstanding on March 3, 1917, whichever is lowest;

(c) Intangible property bona fide paid in for stock or shares on or after March 3, 1917, in an amount not exceeding (a) the actual cash value of such property at the time paid in, (b) the par value of the stock or shares issued

therefor, or (c) in the aggregate 25 per centum of the par value of the total stock or shares of the corporation outstanding at the beginning of the taxable year, whichever is lowest: Provided, That in no case shall the total amount included under paragraphs (4) and (5) exceed in the aggregate 25 per centum of the par value of the total stock or shares of the corporation outstanding at the beginning of the taxable year; but

(b) As used in this title the term "invested capital" does not include borrowed capital.

(c) There shall be deducted from invested capital as above defined a percentage thereof equal to the percentage which the amount of inadmissible assets is of the amount of admissible and inadmissible assets held during the taxable year.

(d) The invested capital for any period shall be the average invested capital for such period, but in the case of a [fol. 24] corporation making a return for a fractional part of a year, it shall (except for the purpose of paragraph (2) of subdivision (a) of section 311) be the same fractional part of such average invested capital.

The average invested capital for the prewar period shall be determined by dividing the number of years within that period during the whole of which the corporation was in existence into the sum of the average invested capital for such years.

SEC. 327. That in the following cases the tax shall be determined as provided in section 328:

(a) Where the Commissioner is unable to determine the invested capital as provided in section 326;

(b) In the case of a foreign corporation;

(c) Where a mixed aggregate of tangible property and intangible property has been paid in for stock or for stock and bonds and the Commissioner is unable satisfactorily to determine the respective values of the several classes of property at the time of payment, or to distinguish the classes of property paid in for stock and for bonds, respectively;

(a) Where upon application by the corporation the Commissioner finds and so declares of record that the tax if determined without benefit of this section would, owing to [fol. 25] abnormal conditions affecting the capital or income of the corporation, work upon the corporation an exceptional hardship evidenced by gross disproportion between the tax computed without benefit of this section and the tax computed by reference to the representative corporations specified in section 328. This subdivision shall not apply to any case (1) in which the tax (computed without benefit of this section) is high merely because the corporation earned within the taxable year a high rate of profit upon a normal invested capital, nor (2) in which 50 per centum or more of the gross income of the corporation for the taxable year (computed under section 223 of Title II) consists of gains, profits, commissions, or other income, derived on a cost plus basis from a Government contract or contracts made between April 6, 1917, and November 11, 1918, both dates inclusive.

SEC. 328. (a) In the cases specified in section 327 the tax shall be the amount which bears the same ratio to the net income of the taxpayer (in excess of the specific exemption of $3,000) for the taxable year, as the average tax of representative corporations engaged in a like or similar trade or business, bears to their average net income (in excess of the specific exemption of $3,000) for such year. In case of a foreign corporation the tax shall be computed without deducting the specific exemption of $3,000 either for the taxpayer or the representative corporations.

In computing the tax under this section the Commissioner [fol. 26] shall compare the taxpayer only with representative corporations whose invested capital can be satisfactorily determined under section 326 and which are, as nearly as may be, similarly circumstanced with respect to gross income, net income, profits per unit of business transacted and capital employed, the amount and rate of war profits or excess profits, and all other relevant facts and circumstances.

(b) For the purposes of subdivision (a) the ratios between the average tax and the average net income of representative corporations shall be determined by the Commis-

sioner in accordance with regulations prescribed by him with the approval of the Secretary.

In cases in which the tax is to be computed under this section, if the tax as computed without the benefit of this section is less than 50 per centum of the net income of the taxpayer, the installments shall in the first instance be computed upon the basis of such tax; but if the tax so computed is 50 per centum or more of the net income, the installments shall in the first instance be computed upon the basis of a tax equal to 50 per centum of the net income. In any case, the actual ratio when ascertained shall be used in determining the correct amount of the tax. If the correct amount of the tax when determined exceeds 50 per centum of the net income, any excess of the correct installments over the amounts actually paid shall on notice and demand be paid together with interest at the rate of ½ of 1 per centum per month on such excess from the time the installment was due.

[fol. 27] (e) The Commissioner shall keep a record of all cases in which the tax is determined in the manner prescribed in subdivision (a), containing the name and address of each taxpayer, the business in which engaged, the amount of invested capital and net income shown by the return, and the amount of invested capital as determined under such subdivision. The Commissioner shall furnish a copy of such records and other detailed information with respect to such cases when required by resolution of either House of Congress, without regard to the restrictions contained in section 257.

[fol. 28] IV. Special Demurrer to Amended Petition. Filed January 28, 1927

Comes now the United States, by the Attorney General, and, demurring specially to the first alleged cause of action of the amended petition filed herein (paragraphs 1 to 22, inclusive), states as grounds therefor:

1. That the facts alleged in paragraphs 1 to 22, inclusive, in the amended petition do not constitute a cause of action.

2. That the facts alleged on paragraphs 1 to 22, inclusive, in the amended petition do not constitute a cause of action, within the jurisdiction of this court.

Respectfully submitted.

Herman J. Galloway, Assistant Attorney General.
Thaddeus G. Benton, Attorney.

V. General Traverse—Filed January 28, 1927

And now comes the Attorney General, on behalf of the United States, and answering the amended petition of the plaintiff herein, denies each and every allegation contained in paragraphs XXIII to XXXI incl., and asks judgment that the petition be dismissed, as to said paragraphs.

Herman J. Galloway, Assistant Attorney General.

T. G. B.

VI. Argument and Submission of Case on Demurrer

On February 21, 1927, the special demurrer in this case was argued and submitted by Mr. Thaddeus G. Benton, for the defendant, and by Mr. Clarence A. Miller, for the plaintiff.

[fol. 29] VII. Opinion—Filed May 2, 1927

On Demurrer

Booth, Judge, delivered the opinion of the court:

This is a tax case. The petition alleges a right of recovery upon two items. To the first item the defendant demurs. The facts alleged to sustain the cause of action are as follows: The plaintiff, a Pennsylvania corporation engaged in the manufacture of wire rope, on June 15, 1919, filed with the Collector of Internal Revenue for the proper district its income tax return for the year 1918. Plaintiff then conceded an income, excess and war tax liability upon the return so filed of $206,381.77, and the same was duly paid in four installments without protest. Subsequently

the Commissioner of Internal Revenue, through Revenue Agents, made an examination of plaintiff's books of account, and on April 14, 1920, advised the plaintiff that a revised computation of its income tax return had increased its tax liability for the year 1918 to the extent of $89,094.85. Plaintiff protested this action of the Commissioner, but the Commissioner made the additional assessment, and it was finally paid by the plaintiff under protest. Thereafter the Commissioner discovered an error in his computation resulting in an overpayment of $12,393.09, which amount was on June 10, 1924, refunded to the plaintiff, leaving an aggregate tax assessed, levied, and paid by the plaintiff upon its return, of $383,083.53.

On June 14, 1924, the plaintiff filed with the Commissioner a claim for a refund of $100,000, stating therein that the amount so claimed represented the amount by which its tax computed under section 301 of the Revenue Act of 1918 exceeded its tax computed under Sections 327 and 328 of the Revenue Act of 1918, insisting upon a right to have its tax liability computed in accordance with Sections 327 and 328 supra. The Commissioner declined to refund. The petition further alleges that as a matter of fact as well as law plaintiff is entitled to have its excess profits tax and war profits tax computed in accordance with Sections 327 and 328 of the Revenue Act and not under the provisions of section 301 of the same law. To this end the allegation is made that it is impossible for the Commissioner or anyone else to determine the correct amount of plaintiff's invested capital as defined in section 326 of the Revenue Act of 1918; [fol. 39] that abnormal conditions exist affecting the capital and income of the plaintiff which work upon it an exceptional hardship, evidenced by gross disproportion between the tax paid by it and its tax computed by reference to representative corporations engaged in the same trade or business. To sustain this allegation particular instances are cited. First, it is alleged that plaintiff pursued a policy of charging large sums expended for plant additions and improvements to an expense account and not to capital; second, that prior to the year 1918 plaintiff developed valuable secret processes essential to the profitable operation of its business, and no part of the cost thereof has ever been capitalized, and the Commissioner ignored this fact in mak-

ing up his adjustment of plaintiff's invested capital; third, that plaintiff, since its organization, has never undergone a reorganization or merger, but has since its organization in May, 1887, conducted an increasing and important business and thereby acquired a good will which asset is not recorded on its books and the value thereof was ignored by the Commissioner in ascertaining plaintiff's invested capital; that under regulations of the Commissioner, its good will is an asset of the value of $1,037,713; fourth, that plaintiff, during the year 1918 borrowed money to use in its business; that on January 1, 1918, plaintiff was using in its business $114,834.91, borrowed funds, and on December 31, 1918, for a like purpose was using $122,353.82, that its capital stock was $100,000; that at the beginning of the year its percentage of borrowed money to capital stock was 114.8 per cent, and at the end of the year 122.3 per cent; fifth, it is alleged that the salaries of its officers were abnormally low, averaging but 3.76 per cent of its taxable income for the year, and finally concluding with the allegation that a comparison of the rate of tax imposed upon the plaintiff with the rate imposed upon representative corporations engaged in a like trade or business would disclose the fact that as to the plaintiff the rate exacted is 63.87 per cent of its taxable income, whereas as to representative corporations the rate is not in excess of 56 per cent of their taxable income. The prayer for judgment is somewhat obscure. If we correctly apprehend it, suit is for the recovery of $100,000 on this item with interest thereon from date of the payment of the final installment, viz: December 31, 1919.

Sections 327 and 328 of the Revenue Act of 1918 (Ch. 18, 40 Stat. 1066), provide in terms as follows:

SEC. 327. That in the following cases the tax shall be determined as provided in section 328:

(a) Where the Commissioner is unable to determine the invested capital as provided in section 326;

(b) In the case of a foreign corporation;

(c) Where a mixed aggregate of tangible property and intangible property has been paid in for stock or for stock and bonds and the Commissioner is unable satisfactorily to determine the respective values of the several classes of

property at the time of payment, or to distinguish the classes of property paid in for stock and for bonds, respectively;

(d) Where upon application by the corporation the Commissioner finds and so declares of record that the tax if determined without benefit of this section would, owing to [fol. 31] abnormal conditions affecting the capital or income of the corporation, work upon the corporation an exceptional hardship evidenced by gross disproportion between the tax computed without benefit of this section and the tax computed by reference to the representative corporations specified in section 328. This subdivision shall not apply to any case (1) in which the tax (computed without benefit of this section) is high merely because the corporation earned within the taxable year a high rate of profit upon a normal invested capital, nor (2) in which 50 per centum or more of the gross income of the corporation for the taxable year (computed under section 233 of Title II) consists of gains, profits, commissions, or other income derived on a cost plus basis from a Government contract or contracts made between April 6, 1917, and November 11, 1918, both dates inclusive.

SEC. 328. (a) In the cases specified in section 327 the tax shall be the amount which bears the same ratio to the net income of the taxpayer (in excess of the specific exemption of $3,000) for the taxable year, as the average tax of representative corporations engaged in a like or similar trade or business bears to their average net income (in excess of the specific exemption of $3,000) for such year. In the case of a foreign corporation the tax shall be computed without deducting the specific exemption of $3,000 either for the taxpayer or the representative corporations.

In computing the tax under this section the Commissioner shall compare the taxpayer only with representative corporations whose invested capital can be satisfactorily determined under section 326 and which are, as nearly as may be, similarly circumstanced with respect to gross income, net income, profits per unit of business transacted and capital employed, the amount and rate of war profits or excess profits, and all other relevant facts and circumstances.

(b) For the purposes of subdivision (a) the ratios between the average tax and the average net income of representative corporations shall be determined by the Commissioner in accordance with regulations prescribed by him with the approval of the Secretary.

In cases in which the tax is to be computed under this section, if the tax as computed without the benefit of this section is less than 50 per centum of the net income of the taxpayer, the installments shall in the first instance be computed upon the basis of such tax; but if the tax so computed is 50 per centum or more of the net income, the installments shall in the first instance be computed upon the basis of a tax equal to 50 per centum of the net income. In any case, the actual ratio when ascertained shall be used in determining the correct amount of the tax. If the correct amount of the tax when determined exceeds 50 per centum of the net income, any excess of the correct installments over the amounts actually paid shall on notice and demand be paid, together with interest at the rate of one half of 1 per centum per month, on such excess from the time the installment was due.

(c) The Commissioner shall keep a record of all cases in which the tax is determined in the manner prescribed in subdivision (a), containing the name and address of each taxpayer, the business in which engaged, the amount of invested capital and net income shown by the return, and the amount of invested capital as determined under such subdivision. The Commissioner shall furnish a copy of such [fol. 32] record and other detailed information with respect to such cases when required by resolution of either House of Congress, without regard to the restrictions contained in section 257.

Section 326 of the Revenue Act of 1918 (40 Stat. 1062) defines invested capital and is in terms as follows:

"(a) That as used in this title the term 'invested capital' for any year means (except as provided in subdivisions (b) and (c) of this section):

"(1) Actual cash bona fide paid in for stock or shares;

"(2) Actual cash value of tangible property, other than cash, bona fide paid in for stock or shares, at the time of

such payment, but in no case to exceed the par value of the original stock or shares specifically issued therefor, unless the actual cash value of such tangible property at the time paid in is shown to the satisfaction of the Commissioner to have been clearly and substantially in excess of such par value, in which case such excess shall be treated as paid-in surplus: Provided, That the Commissioner shall keep a record of all cases in which tangible property is included in invested capital at a value in excess of the stock or shares issued therefor, containing the name and address of each taxpayer, the business in which engaged, the amount of invested capital and net income shown by the return, the value of the tangible property at the time paid in, the par value of the stock or shares specifically issued therefor, and the amount included under this paragraph as paid in surplus. The Commissioner shall furnish a copy of such record and other detailed information with respect to such cases when required by resolution of either House of Congress, without regard to the restrictions contained in Section 257;

"(3) Paid in or earned surplus and undivided profits; not including surplus and undivided profits earned during the year;

"(4) Intangible property bona fide paid in for stock or shares prior to March 3, 1917, in an amount not exceeding (a) the actual cash value of such property at the time paid in, (b) the par value of the stock or shares issued therefor, or (c) in the aggregate 25 per centum of the par value of the total stock or shares of the corporation outstanding on March 3, 1917, whichever is lowest;

"(5) Intangible property bona fide paid in for stock or shares on or after March 3, 1917, in an amount not exceeding (a) the actual cash value of such property at the time paid in, (b) the par value of the stock or shares issued therefor, or (c) in the aggregate 25 per centum of the par value of the total stock or shares of the corporation outstanding at the beginning of the taxable year, whichever is lowest: Provided, That in no case shall the total amount included under paragraphs (4) and (5) exceed in the aggregate 25 per centum of the par value of the total stock or shares of the corporation outstanding at the beginning of the taxable year; but

"(b) As used in this title the term 'invested capital' does not include borrowed capital.

"(c) There shall be deducted from invested capital as above defined a percentage thereof equal to the percentage which the amount of inadmissible assets is of the amount of admissible and inadmissible assets held during the taxable year.

"(d) The invested capital for any period shall be the average invested capital for such period, but in the case of a corporation making a return for a fractional part of a [fol. 33] year, it shall (except for the purpose of paragraph (2) of subdivision (a) of section 311) be the same fractional part of such average invested capital.

"The average invested capital for the pre-war period shall be determined by dividing the number of years within that period during the whole of which the corporation was in existence into the sum of the average invested capital for such years."

A tax case in this court is a suit against the United States founded under our jurisdictional act (Section 145, Judicial Code) upon a law of Congress. The right to sue for internal revenue tax is conditioned upon its payment, application for a refund and denial of the same. Rock Island, Arkansas & Louisiana R. R. Co. v. United States, 254 U. S. 141. Under the allegations of the petition, heretofore recited, it is obvious that the present suit is for a recovery of an alleged illegal tax exaction resulting from the alleged failure of the Commissioner to apply to plaintiff's tax return the applicable sections of the revenue law, i. e. Sections 327 and 328, supra. Plaintiff does not allege that if section 301 of the Revenue Act of 1918 has been legally applied in the assessment and levy of the taxes involved, an over or illegal assessment follows, and judgment for the amount paid thereunder is recoverable. On the contrary, the gravamen of the complaint is that Sections 327 and 328 of the Statute are the applicable sections of the law under which the assessment and levy should have been made, and if so made, would result in a difference of $100,000 in the amount paid and what should have been paid. The court is manifestly without authority to compute a tax under Sections 327 and 328 of the Revenue law. The Commissioner

has refused to apply the sections as requested, and we have no means to compel him to do so. Sections 327 and 328 of the statute point out the method to be pursued by the Commissioner in applying special assessment. In his office and available to him, are the facts, the records, voluminous and important, upon which the Commissioner relies in making comparisons with representative corporations engaged in a like trade or business, and upon no possible hypothesis has the court any means of knowing, in the absence of an official computation by the Commissioner, what the amount of plaintiff's tax would be under the conditions set forth in the law. Until the Commissioner has acted, and the record of his actions is before the court, we are powerless to determine that he should have done something which under the law he positively refuses to do.

Plaintiff admits that internal-revenue taxes are justly due from it to the United States. The issue presented by the petition goes only to the amount. We are not asked to set aside the assessment and levy made under section 301 and award judgment for all the taxes paid thereunder. The relief sought by the plaintiff is a judgment founded upon a law of Congress under which the plaintiff has not incurred a tax liability, under which it has been assessed no taxes, and under which it has paid no taxes. The plaintiff's taxes were assessed under Section 301. They were levied and collected under that section, and no complaint is made that if the section is applicable the amount assessed and paid is illegal. The plaintiff, in our view of the case, has mistaken the remedy. As said by the Supreme Court in the Rock Island case, supra, "Men must turn square corners when they deal with the Government. If it attaches even purely [fol. 34] formal conditions to its consent to be sued those conditions must be complied with." Clearly the plaintiff has paid no taxes under Sections 327 and 328 of the statute. The Commissioner has not levied or assessed any under the sections, and no claim for refund has been made or refused for any sum or sums exacted of the plaintiff under the above sections. What sum the Commissioner might exact or might have exacted under the special assessment provisions relied upon is a problem with which under the petition we are not concerned, and until he does apply the provisions the court is powerless to proceed.

In addition to what has been said, the provisions of the revenue law authorizing special assessment confer upon the Commissioner discretionary power. He is vested by Congress with the right to determine from the facts of each case when the abnormal conditions obtain to warrant the application of the law, which by its very terms indicates that only in exceptional cases is he to resort thereto. The plaintiff does not question the authority of Congress to confer the jurisdiction upon the commissioner, and does not challenge in the petition his good faith or charge abuse of discretion in refusing it classification under the special assessment sections. Plaintiff did not in the beginning question the amount of taxes it should pay, the return made by it, and the taxes due as per the same were voluntarily paid. No complaint was lodged against the exaction until additional taxes were assessed and demanded. Then for the first time the plaintiff insists upon its alleged right to special assessment. Then and only then was the commissioner acquainted with its allegations of an abnormal status and the many unusual factors which prevented him from ascertaining invested capital under Section 326. The presumption is that the Commissioner discharged his duty under the law. In the absence of any information to the contrary, we may not presume that the Commissioner found the statutory difficulties which precluded an assessment under Section 301. On the contrary, his inaction indicates that no such difficulties were encountered. We are without jurisdiction to substitute our judgment for the Commissioner's until he exacts taxes under Sections 327 and 328 and the same are paid thereunder, and a refund asked and refused. We are without jurisdiction to award a judgment as claimed upon the court's computation of what might under the law be due. Louisiana v. McAdoo, 234 U. S. 627; United States v. Balcsack, 250 U. S. 328; Ray Consolidated Copper Co. v. United States, 268 U. S. 373.

The demurrer to the first item of the petition will be sustained, and as to that item the petition is dismissed. It is so ordered.

Moss, Judge; Graham, Judge; Hay, Judge; and Campbell, Chief Justice, concur.

[fol. 35] VIII. JUDGMENT—May 2, 1927

At a Court of Claims held in the City of Washington on the Second day of May, A. D., 1927, judgment was ordered to be entered as follows:

This case was submitted upon the defendant's demurrer to the amended petition. Upon consideration whereof the court is of the opinion that the demurrer to the first item of the amended petition is well taken. It is therefore adjudged and ordered that the defendant's said demurrer to the first item of the amended petition be sustained, and as to that item the amended petition is dismissed.

[fol. 36] Clerk's certificate to foregoing transcript omitted in printing.

Endorsed on cover: File No. 32,789. Court of Claims. Term No. 337. The Williamsport Wire Rope Company, petitioner, vs. The United States. Petition for writ of certiorari and exhibit thereto. Filed June 29th, 1927. File No. 32,789.

(5868)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 28, 1927

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.